Supreme Court, U.S.
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No. 93-710

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FRANK TALLEY,
Petitioner,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE,
Howard L. Fryett, Dennis P. Adams, Lowell Jaeger,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

I. RESPONDENT'S ARGUMENT NO. I CONTAINS FALSE AND/OR MISLEADING STATEMENTS, ARGUES DISPUTED FACTS AS IF THERE WERE NO DISPUTATION, AND SETS UP A FALSE ISSUE.

A. FALSE AND/OR MISLEADING STATEMENTS

Regarding the Sindermann property right issue presently before this Court, it must be pointed out that ever since the beginning of this litigation, the Respondent College's (FVCC) counsel has misrepresented the Petitioner's (Talley) claim, realizing that this false position violates the contractual language. The trial Court, as well as the Montana Supreme

Court, bought into that understanding, rather than relying on Talley's own testimony of what his claim is.

The past practice of FVCC for over twenty years has been to allow part-time instructors to offer courses subject to student enrollment and available funding. Under Sindermann, Talley never demanded tenure/permanent employment, but simply the opportunity for employment that has been and is being provided to all other part-time instructors at the College.

In addition to Talley's various affidavits, there exists in the record the sworn testimony of one present and one former FVCC administrator regarding the legitimate expectation of an opportunity

for continuing employment. At an unemployment compensation hearing, where FVCC could successfully defend itself against a claim if it could show that the instructor might be returning to work after the summer quarter, the administrator stated of the instructor involved that, " . . . she should be expecting that she would be able to come back and teach quarter to quarter."

Likewise a former Dean and President was deposed and testified as to what the position of the College was regarding contract language and practice during all the years he was an administrator. His testimony clearly shows that Talley's beliefs regarding employment opportunities

were not merely subjective, but rather met the objective test of Sindermann.

It is obvious that there are disputed facts regarding what the practice and understanding of FVCC has been regarding employment rights for part-time instructors. And the Montana Supreme Court has previously held that,

> "Summary judgment is never an appropriate substitute for a trial if a factual controversy exists." Frazer vs. Valley County School District No. 2, 846 P.2d., 367, 369 (1993).

The lower courts, relying solely on the interpretation of FVCC's counsel for the putative current understanding of the contract language, and of FVCC's counsel's version of Talley's claim, granted summary judgment on all of Talley's lawsuit where

this issue could be made to fit.

But there has never been any evidence before the lower courts that Talley's claim was inconsistent with contract language. There was never any sworn testimony relied on by the Respondents regarding the issues for which summary judgment was granted. FVCC's counsel's arguments are not evidence, and for the purposes of summary judgment, should never have been allowed to outweigh the sworn testimony of three individuals to the contrary.

B. DISPUTED FACTS

In numerous instances, both when moving for Summary Judgment, and on appeal, the Respondents argued disputed facts as if there were no controversy. In every

instance, Talley pointed this out to the lower courts, by introducing into evidence the relevant testimony from depositions, discovery documents, or official College records that contradicted FVCC's version. This tactic of the Respondents has now been continued before this Court.

For example, Talley claims that he was removed from the Spring 1989 schedule by a vindictive Dean as a retaliation for Talley's previous speech which was critical of the administration. (The Montana Supreme Court recognized that this was Talley's contention. See Petition, Appendix A, pages 4 and 5).

Obviously, FVCC does not want to admit to that impermissible behavior. Naturally, it

has to advance a legitimate reason for refusing to hire Talley for the first time in over six years. So to both lower Courts and now at p. 2 of its Respondent's Brief, FVCC once again states,

> "The Curriculum Committee, a standing committee at the College, developed criteria by which classes would be scheduled for Spring Quarter, 1989. The classes Talley proposed to teach were not included on the schedule under those criteria."

This explanation, if believed, would hide unconstitutional behavior. But it is a disputed fact.

Talley introduced into evidence before both lower courts, the deposition of Respondent Adams' secretary:

> Q. . . . in the prior quarter Talley had raised some cane and

possibly raised some action at the administrative level, and then along came the Spring quarter and he was just canceled, period, outright. Did anyone discuss, talk about, tell suggest why Talley's classes were sticken from the Spring schedule you have in your hands.

A. No. We were just told to do it.

Q. As a body who sits on the Curriculum Committee meetings, are you of the opinion that there's a criteria for adding deleting, etc., classes?

A. Yes

Q. Do you know whether any of those criteria were complied with before Talley's two classes were stricken in the Spring Quarter

of 1989?

A. We just did as we were told. We didn't go and check to make sure everything matched.

A similar false statement occurs on p. 3 of Respondent's Brief.

> Talley, through counsel, made written demand that he be employed by the College to teach during the Spring Quarter, 1989 .

Talley's counsel never made that demand; but only that Talley be given the opportunity based on the criteria, and that Talley not be discriminated against.

C. FALSE ISSUE

Talley's argument no. I in his Petition claims that the Montana Supreme Court failed to give him an opportunity to

establish his property interests. It did this, of course, by denying him a trial wherein these multifarious disputed facts could be weighed by a jury.

The Respondents however, in what can only be seen as an effort to befuddle this Court, invent a non-existent issue: i.e., that Talley has cried foul because he needed more time to conduct discovery. Nowhere, ever, and certainly not in his Petition, did Talley take any such position. He was more than ready to go to trial two years ago.

All Talley is contending is that the Montana Supreme Court has not ruled in compliance with established Montana and Federal principles or case law regarding

summary judgment.

The Montana Supreme Court has previously stated:

> "Summary judgment is therefore not a proper tool for resolving disputed issues of fact and is accordingly improper whenever a factual matter is in dispute. (Citations omitted) Moreover the party opposing the Motion ... will be indulged to the extent of all inferences which may be reasonably drawn from the record." (Jenkins v. Hillard, 647 P.2d., 354, 356 (1982)).

There is no way imaginable that this case was properly determined in compliance with those principles.

II. RESPONDENT'S ARGUMENT NO. II SETS UP A FALSE ISSUE AND CONTAINS FALSE AND/OR MISLEADING STATEMENTS.

A. FALSE ISSUE

On p. 20 of their Brief, the Respondents once again resort to interpolating their own understanding of Talley's position: "Talley argues, in effect, that summary judgment is not available . . . when constitutional violations are alleged." Talley never said that. But even if he had, and was in error, it makes no difference. For no matter what issues are involved, he was entitled to have his evidence believed. (Anderson v. Liberty Lobby, Inc., 477 US 242, 91 L.Ed2d., 202, 106 S.Ct. 2505: 91 L.Ed.2d. at 216).

B. FALSE AND/OR MISLEADING STATEMENTS

Respondents next seize on the Petitioners use of the word "contentions" and observe

that " . . . it is evidence, not contentions, which establishes genuine issues of material fact." (Respondents Brief, p. 26).

The "understandings" or "contentions" referenced by the Respondents on p. 27 of their Brief, each had evidence; which at a minimum showed the existence of disputed facts.

Talley compiled a large appendix for his Appeal Brief to the Montana Supreme Court which showed a host of evidence; nearly all of which was either overlooked or disbelieved by the lower courts. For example:

A. Talley's affidavits, the testimony of a former Dean and President, as well as a Dean's memo produced by Talley show that

part-time instructors planned their teaching a year in advance.

B. Talley supplied the memo wherein the College offered grants of money for future quarters.

C. Talley introduced into evidence the deposition of the former Dean and President who testified as to the legitimate expectation of employment opportunity, and to the equivalent of a "promise" that he had made to Talley in that regard.

D. Talley introduced into evidence a letter to him from the FVCC Board of Trustees dated June 14, 1989, which stated:

> "The Board cannot guarantee you any continuation of employment. The administration will consider you for employment as a part-time instructor on a quarter by quarter basis as we consider others who have expressed a desire to serve as part-time

instructors.

This promise from the Board of Trustees to Talley that he would be treated equally along with other part-timers was broken; (equal protection). For Talley introduced into evidence a memo from Respondent Fryett to the Dean and the Department Chairman (as well as other documents) ordering them not hire Talley because he had not disavowed his beliefs and acknowledged something he did not believe, and because he had filed suit. (Talley included a charge of failure to hire based on having filed a lawsuit (under both state and federal law), but neither court took any notice, and granted summary judgment by their silence. On p. 3 of their Brief, the Respondents admit that, "Talley has not since been hired by the College."

E. As mentioned on p. 6, 7 of his Petition Talley contended that Respondent Fryett promised him employment for the Spring Quarter with a student petition (as well as for later quarters). Talley introduced into evidence the

depositions of several students who were involved in the successful petitioning and to whom the promises were made as well.

For this incident, the following from Sindermann, clearly applies:

> "Explicit contractual provisions may be supplemented by other agreements implied from the promisor's words and conduct in the light of the surrounding circumstances. And, the meaning of the promisor's words and acts is found by relating them to the usage of the past." Perry v. Sindermann, 408 US 593, 92 S.Ct. 2694, 34 L.Ed.2d., 570 (1972).

Additionally,

> "More recently, the Court has refused to limit constitutional 'property' rights to

> mere contract rights (citations omitted). Legitimate and reasonable reliance on a promise from the state can be the source of property rights protected under the Due Process Clause and Civil Rights Statutes." (Vail v. Board of Education of Paris Union School District No. 95, 706 F.2d 1435 (1983), Affirmed, 466 US 377, 80 L.Ed 2d 377).

CONCLUSION

In sustaining the award of summary judgment in this case, the Montana Supreme Court has held that part-time instructors at Montana's largest community college, whose efforts have accounted for approximately one half of the credits taught, even though they may have been

employed for twenty-five years, year round at 2/3 time (30 hours per week), can, if they happen to somehow offend the sentiments of some autocratic and vindictive administrator, be fired or not rehired, and irrespective of past practices or promises made regarding employment opportunities, have practically no recourse for justice or due process. And because of the way the case was decided, the rationale regarding property rights can be extended to all Montana workers.

This case is very complex. Even at the federal level, there are no less than twelve separate instances of alleged violations: denial of property rights in general; general and specific promises of

employment; two issues regarding free speech; another liberty issue regarding slander; three instances of denial of equal protection of the law; non-hiring for having filed a lawsuit; and specific refusal to grant a due process hearing. Not all of those issues could be brought before this Court at this time; even though many received summary judgment by silence (neither Court giving any indication that they were aware of them).

In Sindermann, supra, at 578, this Court held that the award of summary judgment against a college professor in a situation similar to this case was improper.

And in Peacock, (quoted more fully on p. 19 and 20 of the Petition) the Ninth

Circuit Court of Appeals wrote that:

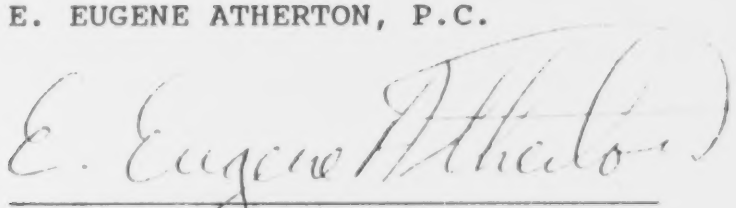
> "Summary judgment in cases such as this would mean that many instances of retaliatory firings might never reach the jury. Only a full trial can separate permissible motivations from those that merely hide unconstitutional behavior." (Peacock v. Duval (1982), 694 F.2d., 644, 648).

Wherefore: since the Montana Supreme Court, by denying Talley a trial, has denied him the opportunity to offer to the jury the evidence of his property rights as given in Sindermann and Vail, and since that Court as well as ignored this Court's interpretation of federal rules regarding summary judgment as given in Liberty Lobby and that of the Ninth Circuit Court of Appeals in Peacock, Talley respectfully requests this Court to grant certiorari and

conduct its own review of the record below.

Respectfully submitted this 16th day of December, 1993.

E. EUGENE ATHERTON, P.C.



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CERTIFICATE OF SERVICE

I, Brenda Hamblin, secretary to E. Eugene Atherton, do hereby certify that on this 16th day of December, 1993, I forwarded a true and correct copy of the foregoing PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION, by first class mail, postage prepaid, upon:

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